

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHOENIX FOUR GRANTOR	:	CIVIL ACTION
TRUST #1	:	
	:	
Plaintiff,	:	
	:	
V.	:	NO. 00-597
	:	
642 NORTH BROAD STREET	:	
ASSOCIATES, 660 NORTH BROAD	:	
STREET ASSOCIATES, P&A	:	
ASSOCIATES, ALAN E. CASNOFF,	:	
PETER L. SHAW	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

YOHN, J.

NOVEMBER , 2001

Plaintiff, Phoenix Four Grantor Trust #1 (“Phoenix”), is the holder of two mortgages executed by the defendants, 642 North Broad Associates and 660 North Broad Street Associates (“Associates”), and guaranteed by the defendants P&A Associates, Peter Shaw and Alan Casnoff. The maturity date of the mortgages was December 31, 1999, at which time the outstanding principle of more than \$11 million was payable in full. Payment was not made and plaintiff sued Associates for breach of contract and foreclosure and the other defendants as guarantors. The defendants have filed counterclaims.

The defendants filed a jury demand and plaintiff has filed a motion to strike defendants’ demand for jury trial as untimely and waived. Although the jury demand was timely, the motion to strike will be granted because defendants contractually waived the right to a jury trial in all legal

proceedings related to the three primary loan documents.

I. Timeliness

The complaint was filed on February 1, 2000. Defendants filed an answer, affirmative defenses, and counterclaims on March 15, 2000. Plaintiff responded with a motion to dismiss the counterclaims. On April 11, 2000, defendants filed their jury demand. The court granted the motion to dismiss the counterclaims in part, and defendants filed their first amended counterclaims on July 7, 2000, which plaintiff answered on July 20, 2000.

Fed. R. Civ. P. 38(b) provides that “[a]ny party may demand a trial by jury of any issue triable of right by a jury” if the demand is made “not later than 10 days after the service of the last pleading directed to such issue.” The failure to comply with this requirement constitutes a waiver of trial by jury. *See* Fed. R. Civ. P. 38(d). Under Fed. R. Civ. P. 7(a), counterclaims and answers to counterclaims are pleadings. Thus it is clear that the jury demand was timely as to the counterclaims.

If a counterclaim is compulsory, a valid request for a jury trial on the counterclaim entitles the defendant to a jury trial not only on the counterclaim, but also on the original claim.

The test for determining whether a request for a jury on a counterclaim entitles a party to a jury trial on the complaint is whether the counterclaim is compulsory, that is, whether it arises out of the subject matter of the plaintiff’s legal claim. Since a compulsory counterclaim, by definition, relates to the issues raised in the complaint, the demand brings those issues before the jury.

8 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 38.50[9][c], at 38-241 (3d ed. 1997) (citing *Park Club, Inc. v. Resolution Trust Corp.*, 967 F.2d 1053, 1057 (5th Cir. 1992)). The Third Circuit has held that a counterclaim is compulsory if the counterclaim bears a “logical relationship” to the

plaintiff's claim, involves many of the same factual issues as the plaintiff's claim, is an offshoot of the same basic controversy, or would be barred under the doctrine of res judicata if the defendant tried to bring the counterclaim as a subsequent suit. *See Beard v. Braunstein*, 914 F.2d 434, 442 n.13 (3d Cir. 1990) (quoting *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir. 1961)); *Savarese v. Agriss*, 883 F.2d 1194, 1208 (3d Cir. 1989) (quoting *Great Lakes Rubber Corp.*, 286 F.2d at 634); *Xerox Corp. v. SCM Corp.*, 576 F.2d 1057, 1059 (3d Cir. 1978) (quoting *Great Lakes Rubber Corp.*, 286 F.2d at 634). In addition, Fed. R. Civ. P. 13(a) provides that compulsory counterclaims are claims which "at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

Defendants' counterclaims are clearly offshoots of the same basic controversy and involve many of the same factual issues as plaintiff's claims. As a result, the counterclaims are compulsory. Because the counterclaims are compulsory, defendants' timely request for a jury trial on their counterclaims entitles them to a jury trial on the claims raised by the complaint.

Plaintiff further contends, however, that waivers of the right to a jury trial in three primary loan documents are binding as to the counterclaims involving other loan documents that do not contain waivers of the right to a jury trial.

II. Waiver

The Loan Agreement,¹ Promissory Note,² and Suretyship Agreement³ signed by Associates contain jury trial waivers. Phoenix claims that these three documents contain jury trial waivers that apply to any legal proceedings arising, not only under any of the three primary documents, but also, under any other loan-related document. *See* Reply Memorandum in Support of Plaintiff’s Motion to Strike Defendants’ Demand for a Jury Trial, at 1-2. Phoenix points out that the term “loan documents” is defined in both the Loan Agreement⁴ and the Promissory Note⁵ to include a broad range of documents related to the dealings between Associates and Phoenix. *See id.* at 2. Phoenix also argues that the jury trial waiver was “knowing and voluntary” because Associates: 1) signed

¹ Section 8.03. Jurisdiction and Venue provides as follows:
“Borrowers hereby [sic] waives the right to trial by jury in any action arising hereunder, under the other Loan Documents or otherwise in connection with the Loans.” (Emphasis added).

² Section 12. Waivers by Makers, Cumulative Remedies, Etc. provides as follows:
“Each Maker hereby waives its right to trial by jury in connection with the enforcement of this Note or any other Loan Document in any legal proceedings arising hereunder or thereunder.” (Emphasis added).

³ Section 10. Jurisdiction and Service of Process provides as follows:
“Each Surety hereby unconditionally and irrevocably . . . waives, to the extent permitted by law, any right . . . to trial by jury in [any action, suit or proceeding under or relating to, or to enforce any of the provisions of, this Agreement].”

⁴ Section 2.03. Loan Documents; Security provides as follows:
“The Notes, Mortgage, Assignment of Leases, General Collateral Assignment, Tri-Party Agreement, Environmental Agreement, Financing Statements, and all other documents executed by Borrowers evidencing and securing the Loans (collectively, with this Agreement, the ‘Loan Documents’)” (Emphasis added).

⁵ Section 7. Security:
“The Note, the 642 Broad Mortgage, the 660 Broad Mortgage, the Loan Agreement, the Assignment of Leases, the Suretyship Agreement, the General Collateral Assignment and all other documents evidencing or securing the Term Loan executed by Maker in favor of Payee or executed or delivered in connection with the Loan Agreement are hereinafter referred to collectively as the ‘Loan Documents.’” (Emphasis added).

three agreements; 2) were represented by counsel in connection with the loan; and 3) are sophisticated and seasoned real estate developers. *See id.* at 4.

Associates aver that Phoenix has failed to satisfy the burden that rests on it to prove that the jury trial was surrendered through a knowing and voluntary waiver. *See* Reply Memorandum in Opposition to Plaintiff's Motion to Strike Defendants' Demand for a Jury Trial ("Defs.' Mem."), at 5-6. In the alternative, Associates point out that the documents that form the bases for their counterclaims do not contain jury trial waivers. *See id.* at 6-8.

The Seventh Amendment right to a jury trial can only be surrendered through a knowing and voluntary waiver. *See CoreStates Bank, N.A. v. Signet Bank*, No. CIV. A. 96-3199, 1997 WL 117010, at *6 (citing *Hydramar v. General Dynamics Corp.*, 1989 WL 159267, at *3 (E.D. Pa. Dec. 29, 1989)). In deciding whether a waiver is knowing and intelligent, a court may consider: (1) whether there exists gross disparity in bargaining power between the parties; (2) the business or professional experience of the party opposing the waiver; (3) whether the opposing party had the opportunity to negotiate contract terms; and (4) whether the clause containing the waiver was conspicuous. *See id.* A voluntary waiver may be inferred from the circumstances surrounding the agreement, and the party seeking to enforce the waiver bears the burden of proof. *See id.*

The jury trial waivers of the Loan Agreement, Promissory Note, and Suretyship Agreement are enforceable. Both parties are sophisticated business entities, no gross discrepancy of bargaining power existed between the parties, and the waiver clauses are easy to decipher. That Associates were represented by counsel and signed three separate documents containing jury trial waivers also weighs heavily against them.

The jury trial waivers are applicable to Associates' counterclaims. The narrowest of the jury

trial waivers applies to all legal proceedings arising under the Promissory Note or any other loan document. *See* Memorandum of Law in Support of Plaintiff’s Motion to Strike Defendants’ Demand for Jury Trial, Exhibit B (Promissory Note), at § 12. As used in this jury trial waiver, “any other loan document” encompasses “[t]he Note, the 642 Broad Mortgage, the 660 Broad Mortgage, the Loan Agreement, the Assignment of Leases, the Suretyship Agreement, the General Collateral Assignment and all other documents evidencing or securing the Term Loan executed by Maker in favor of Payee or executed or delivered in connection with the Loan Agreement” *Id.* at § 7. Although Associates’ counterclaims do not arise directly under the three agreements that contain jury trial waivers, the claims involve documents expressly within the purview of the term “loan documents” as defined in the three primary agreements. The documents Associates insist their counterclaims “revolve primarily around,” the Cash Management Agreement, Assignments of Leases and Rents, and the Mortgages of the properties at issue, are all either explicitly or implicitly “loan documents” under both the Loan Agreement and the Promissory Note. *See* Defs.’ Mem., at 6. Indeed, defendants aver that “[b]oth the claims and counterclaims arise out of a relationship between Phoenix and 642 Associates. At trial, the proofs for both the claims and counterclaims will center on certain documents and the actions or inactions of the parties with respect to those documents.” *Id.* at 4. As a result, the court concludes that Associates’ counterclaims are not beyond the scope of the jury trial waivers and plaintiff’s motion to strike defendants’ demand for a jury trial will be granted.

An appropriate order follows.

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ASSOCIATES, 660 NORTH BROAD
STREET ASSOCIATES, P&A
ASSOCIATES, ALAN E. CASNOFF,
PETER L. SHAW

Defendants.

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CIVIL ACTION

NO. 00-597

ORDER

AND NOW, this 14th day of November, 2000, upon consideration of plaintiff's motion to strike defendants' demand for a jury trial, defendants' reply, and plaintiff's reply, IT IS HEREBY ORDERED that the motion is GRANTED and defendants' demand for a jury trial is STRICKEN.

William H. Yohn, Jr., Judge